IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.2112 OF 2005
WITH
WRIT PETITION NO.3466 OF 2004

W.P.No.2112/05:

Popcorn Properties Private Limited & Anr. ...Petitioners.
Vs.
State of Maharashtra & Ors. ...Respondents.

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Mr. Janak Dwarkadas, Senior Advocate instructed by M/s. P.K. Shroff & Co. for the Petitioners.
Mr. Ravi Kadam, Advocate General with Mr.R. M. Sawant, Government Pleader for Respondent Nos.1 to 3.
Mr. K.K. Singhvi, Senior Advocate with Mr. C. U. Singh, Senior Advocate, Mr. R.U. Singh and Mr.Rohit Shetty for Respondent No.5.

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W. P. No.3466/04 :

Jay Krishna Industries Ltd. ...Petitioner.
Vs.
The State of Maharashtra & Anr. ...Respondents.

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Mr. K.K. Singhvi, Senior Advocate with Mr. C. U. Singh, Senior Advocate, Mr. R.U. Singh and Mr.Rohit Shetty for the Petitioner.
Mr. Ravi Kadam, Advocate General with Mr.R. M. Sawant, Government Pleader for the Respondents.

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CORAM : DALVEER BHANDARI, C.J. AND
DR.D.Y.CHANDRACHUD, J.

October 17, 2005.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.):

The Mumbai Housing and Area Development Board owns a plot of land admeasuring 10,000 sq.mters, situated at Adishankarachaya Marg, Powai Lake, Mumbai. The Board, which is the Third Respondent in these proceedings, invited tenders in November 2004 for the lease of the plot which was to be developed for a hotel. The period of lease was to be 90 years, the initial period being 30 years, followed by renewals for two successive terms of equivalent duration. Application forms were to be distributed between 22nd and 30th November 2004 and the last date for acceptance of bids was 2nd December 2004. Bidders were required to furnish an earnest money deposit of Rs.1 crore together with the application. Of the lease rental that was quoted by each bidder, an amount of 8% was to be paid along with the bid amount, 25% was liable to be paid within fifteen days of the letter of acceptance and the balance 75% within thirty days of the issue of an IOD by the Municipal Corporation.

2. The Petitioners (for the sake of convenience we refer to the array of parties in (W.P. 2112/05) submitted a bid in response to the tender notice, in the amount of Rs.22,22,22,300/-. Three other bidders submitted offers. The Fifth Respondent did not

submit a bid in response to the tender notice. The Petitioners submitted an earnest deposit of Rs.1 crore together with their bid. Upon the opening of bids on 10th December 2004, the Petitioners being the highest bidders, were, by a communication dated 17th December 2004 informed of the provisional acceptance of their bid. The Petitioners were called upon to deposit an amount of Rs.5,55,55,575/- being 25% of the bid amount by 3rd January 2005 and the balance within 30 days of the receipt of an IOD from the Municipal Corporation. The Petitioners paid an amount representing 25% of their bid, on 30th December 2004. The Board thereupon issued a no objection, allowing the Petitioners to submit plans. On 7th February 2005, the Petitioners submitted plans to the Municipal Corporation. On 29th April 2005, the Board called upon the Petitioners to deposit the balance representing 75% of the bid amount on or before 17th June 2005, failing which it was stated that the offer would stand rejected.

3. On 3rd May 2005, the Petitioners addressed a letter to the Maharashtra Housing and Area Development Board recording that they had learnt that the Board was unlawfully trying to deal with the Fifth Respondent in respect of the very same plot wherein

the bid submitted by the Petitioners had been accepted. Now it appears from the documentary material on the record of these proceedings that the Fifth Respondent had applied to the Housing and Special Assistance Department of the State Government in 1999 for the allotment of the plot. On 5th October 1999, the Under Secretary in the Housing and Special Assistance Department informed MHADA that a Cabinet Sub Committee had decided on 5th July 1999 to allot the lands to the Fifth Respondent in exercise of powers vested in the State Government by Regulation 16. Subsequently, on 22nd February 2000, a further communication was addressed by the Housing and Special Assistance Department to MHADA recording that the matter had been reviewed by the Cabinet Sub Committee and that the decision which was taken at the earlier meeting had been rescinded on 4th January 2000. In para 3.4 of the Petition, it has been averred that in November 2003 a communication was sent by the Housing and Special Assistance Department to the Chief Officer of the Board that the plot be disposed of in terms of the regulations by issuing a fresh advertisement.

4. Tenders, as noted above, were accordingly invited at

which the bid submitted by the Petitioners came to be provisionally accepted on 17th December 2004. The Fifth Respondent admittedly had not submitted a bid in response to the tender notice. The Fifth Respondent filed a Writ Petition in this Court under Article 226 of the Constitution, Writ Petition No.3466 of 2004 (earlier Lodging No.3272 of 2004), seeking inter alia relief to the effect that the tender process be quashed and that the plot be allotted to the Fifth Respondent. The Petitioners were not impleaded as parties to the aforesaid petition. On 23rd December 2004, the petition came up for hearing before the Division Bench. The order of the Court records the statement of the Government Pleader that an offer had been received by the Board in the amount of Rs.22,22,22,300/- in pursuance of the tenders. The order of the Court is reproduced hereinbelow:

> "The Learned Government Pleader appearing for the Respondents has placed on record an offer letter by which he is getting a bid of Rs.22,22,22,300/- for a plot admeasuring approximately 10000 sq.mtrs. in pursuance of the tender floated by Respondent No.2. In case, the Petitioner is in a position to give higher offer, the same would also be considered by the concerned authority within a period of one week. No further directions are necessary. This petition is accordingly disposed of."

The order of the Division Bench would thus show that the

statement which was made before the Court was that an offer had been received in the course of the tender enquiry. The statement of the Government Pleader, it must be noted, was not to the effect that the bid submitted in pursuance of the tender by the Petitioners been provisionally accepted on 17th December 2004.

5. On 29th December 2004, the Fifth Respondent purported to submit an offer in the amount of Rs.22,23,22,300/- namely, in an amount Rs.1 lakh more than the bid of the Petitioners which was Rs.22,22,22,300/-. On 31st January 2005, the Third Respondent Board addressed a letter to the Fifth Respondent advising it to enhance its offer to an amount at least Rs.10 lakhs more than the bid of the Petitioners. The Fifth Respondent was also informed that interest would have to be paid to the Petitioners who had already made a payment of Rs. 6.55 crores to MHADA. The Fifth Respondent agreed to enhance its offer on 15th February 2005 to Rs.22,32,22,300/- subject to certain conditions. On 5th March 2005, the Second Respondent addressed a letter to the Fifth Respondent accepting its offer in the amount of Rs.22,32,22,300/- and directing an immediate deposit within 24 hours together with interest. The Fifth Respondent was informed that the offer would

stand cancelled if the full amount was not deposited. The Fifth Respondent thereafter, addressed several letters on 7th March 2005, 12th March 2005, 28th March 2005, 1st April 2005, 5th April 2005 and 28th April 2005 to the Board.

6. On 29th April 2005, a communication was addressed by the Chief Officer of the Third Respondent to the Fifth Respondent cancelling the allotment made in favour of the Fifth Respondent for failure to comply with the terms set out in the letter of acceptance dated 5th March 2005. The Third Respondent stated that the Fifth Respondent had not complied with the requirement of depositing the entire consideration and had merely delayed complying with its obligations on one pretext or another. On the same day, as noted earlier, a letter was addressed to the Petitioners calling upon them to deposit 75% of the amount of the balance due by 17th June 2005.

7. On 30th April 2005, however, the Vice President of the Second Respondent Board, addressed another letter to the Fifth Respondent. It would be rather instructive to extract from the letter verbatim. The letter to the Fifth Respondent reads thus:

> "You have been already informed vide our letter dated 29.4.2005 that all your enquiries and conditions are nothing but delaying tactics and interfering in the process of administration. However, Mr.Mohan Rawle, Member of Parliament called on me on 29.4.2005 and tried to press your case. Similarly he has also given a letter to Hon'ble CM. You are given last opportunity to make payment as offered by you by Tuesday the 3rd May 2005 during banking hours of Bank of Maharashtra, Bandra (E), i.e. 10.30 a.m. To 3.30 p.m. and there should not be any problem as you have been proclaiming again and again that you are holding the Pay Order.
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> It is once again reiterated that all these enquiries and conditions you ought to have considered before approaching the court and making offer for the plot and no correspondence on this serve will be entertained by MHADA. If you fail to pay the amount on or before Tuesday the 3rd May 2005, the offer stands cancelled."

The Board, despite cancelling the allotment made to the Fifth Respondent on 29th April 2005 thus wrote a letter on 30th April 2005 (though it seems to be dated 30th May 2005) calling upon the Fifth Respondent to pay the balance on or before 3rd May 2005. in pursuance thereto, the Fifth Respondent purported to make a payment in the amount of Rs.22,32,22,300/- on 2nd May 2005.

8. At that stage, these proceedings under Article 226 of the

Constitution were moved before this Court. In essence, the submission of the Petitioners is that (i) In pursuance of the tender enquiry, the Petitioners had submitted a bid to the Third Respondent. The bid came to be accepted on 17th December 2004; (ii) The Second and Third Respondents failed to inform this Court on 23rd December 2004 when the petition filed by the Fifth Respondent came up for hearing that the bid submitted by the Petitioners had in fact, been provisionally accepted. The order of the Court would demonstrate that the statement which was made by the Government Pleader was that an offer had been received by the Board. The Fifth Respondent did not implead the Petitioners as parties to the said proceedings; (iii) The offer submitted by the Fifth Respondent was entertained by the Board contrary to all tendering norms though the Fifth Respondent had not submitted a bid, nor deposited the earnest money as required by bidders; (iv) The purported claim of the Fifth Respondent was on the basis that there was an allotment in its favour in October 1999 which is factually incorrect as the Housing and Special Assistance Department had informed the Board in February 2000 that the earlier decision to allot the plot to the Fifth Respondent had been rescinded; (v) In any event, all that the order of this Court recorded

was that if the Fifth Respondent did make an offer, the same may be considered. This, however, did not mean that the Board should deal with the Fifth Respondent behind the back of the Petitioners who were the highest bidders and whose bid had been provisionally accepted; and (vi) On 29th April 2000, the acceptance which was communicated to the Fifth Respondent was cancelled and the Petitioners were called upon to make payment of the balance amount of 75% on or before 17th June 2005. This letter of 29th April 2005 was reviewed and overruled by the Vice President of the Second Respondent on the basis of a representation made inter alia to the Chief Minister and to a Member of Parliament by the Fifth Respondent. In the circumstances, it has been submitted that the entire conduct of the Board has been arbitrary, and lacking in fairness.

9. On the other hand, on behalf of the Fifth Respondent, it has been submitted that an allotment was made validly to the Fifth Respondent on the basis of the earlier decision taken in 1999 by the State Government. It was submitted that the Fifth Respondent paid valuable consideration to the Board in pursuance of the acceptance of the bid and that rights that had enured to the benefit

of the Fifth Respondent should not be disturbed.

10. When this petition came up for admission on 14th July 2005, the Learned Advocate General made a statement before the Court, together with the Government Pleader, which was recorded in the following terms:

> "Learned Advocate General along with Mr. R.M. Savant, Government Pleader appearing for MHADA authority submits that on 25th December, 2004 when this case came up for hearing, learned Government Pleader Mr. R.M. Savant was not aware that in this matter the Petitioner's bid was provisionally accepted by Maharashtra Housing and Area Development Board (MHADA) and for that reason he could not inform the Court about the same. Learned Advocate General prays for a short adjournment to file an affidavit of a responsible officer of MHADA. Let this be done within one week.
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> Mr. Singhvi, learned senior counsel appearing for Respondent No.5 says that he may be permitted to withdraw the money already deposited with MHADA on 2nd May 2005 and 7th May 2005. Learned Advocate General has no objection. Liberty to withdraw that amount by substituting a bank guarantee. Let that be done within three days."

In the circumstances, it was categorically stated in no uncertain terms by the Learned Advocate General and the Government Pleader that when the earlier petition filed by the Fifth

Respondent was taken up by this Court on 23rd December 2004, the Government Pleader was not aware that the bid submitted by the Petitioners was provisionally accepted by MHADA and that this Court was consequently not informed of this fact.

11. In pursuance of the permission sought by the Learned Advocate General to place an affidavit on record, an affidavit was filed on 18th July 2005 by Ravindra G. Karkhanis, Deputy Chief Engineer (South), Mumbai Building Repairs and Reconstruction Board. The deponent of the aforesaid affidavit stated that he was holding the post of Director (Marketing) of the Board when the Petition filed by the Fifth Respondent had been taken up and in his affidavit he deposed thus :

> "I say that I am filing this affidavit to place on record the fact that on 23.12.2004 when the aforesaid Writ Petition (Lodg) No.3272 of 2004 was heard for admission by the Hon'ble Division Bench ... I was present in the Court on behalf of the MHADA to instruct Shri R.M. Savant, Government Pleader who was appearing in the matter. On the said day, I had produced a statement of the offers received for the plot in question pursuant to the opening of the tenders on 10.12.2004. I had shown the said statement to Shri Savant, who in turn had shown it to the Hon'ble Division Bench.
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> -3. I say that inadvertently I had not informed or instructed Shri Savant of the provisional letter of allotment issued to the Petitioner dated 17.12.2004. In

> view thereof, Shri Savant was not aware of the said provisional letter of allotment on 23.12.2004, when the said petition came to be disposed of."

12. The Managing Director of the Fifth Respondent filed an affidavit claiming that a search had been taken of the proceedings in the earlier petition which revealed that the offer letter dated 17th December 2004 signed by the Chief Officer of the Board was in the records of the Court. Surprisingly, a further affidavit was filed on 22nd July 2005 on behalf of the Mumbai Building Repairs and Reconstruction Board by Shri Karkhanis stating that his earlier affidavit was based on memory, without taking inspection or search of the records in the earlier petition and that upon taking inspection on 22nd July 2005, it was found that the provisional letter of allotment dated 17th December 2004 issued to the Petitioners was on the records of the Court.

13. During the course of the hearing of these proceedings, the Learned Advocate General appearing on behalf of the First, Second and Third Respondents has fairly submitted that the conduct of the Second and Third Respondents cannot be supported with reference to any norms of fair procedure. This

Court must on its part record its disapproval of the manner in which the Second and Third Respondents have conducted themselves both in relation to the subject matter of the tender enquiry and in relation to their conduct before this Court. The order of this Court dated 23rd December 2004 specifically adverts to the fact that the Government Pleader had placed an offer letter received by the Board on record. Fairness required that this Court should have been informed of the fact that the bid submitted by the Petitioners had been provisionally accepted by the Board on 17th December 2004, before the Petition filed by the Fifth Respondent was taken up. We have serious reservations about the manner in which the provisional letter of acceptance has appeared in the records of the proceedings. This Court must proceed on the basis of what was recorded in the order dated 23rd December 2004 and the solemn statements responsibly made by the Learned Advocate General and by the Government Pleader on 14th July 2005.

14. Besides this, the order of this Court dated 23rd December 2004 could not in any circumstances be construed as permitting the Board to consider an offer that was to be submitted by the Fifth Respondent in a manner that would be contrary to the

requirements of fairness and transparency in the tender process. The order of the Court was unfortunately misconstrued by the Board as enabling it to deal with the Fifth Respondent behind the back of the Petitioners. That is not consistent with the letter or the spirit of the order. The Fifth Respondent submitted an offer in an amount higher than the bid of the Petitioners by Rs.1 lakh, the original bid of the Petitioners being Rs.22,22,22,300/-. The Board called upon the Fifth Respondent to enhance the offer by an amount of Rs.10 lakhs which the Fifth Respondent then did. This was done and an acceptance followed. All these circumstances transpired in the absence of the Petitioners. Ultimately the Board issued a letter dated 29th April 2005 to the Fifth Respondent cancelling the allotment on the ground that the Fifth Respondent had failed to pay the entire consideration as required by the Board by its letter dated 5th March 2005. On the very next day, however, the Vice President and the Chief Executive Officer of MHADA reviewed the cancellation and extended time to the Fifth Respondent to pay on or before 3rd May 2005.

15. The entire course of dealings by the Second and Third Respondents is totally lacking in transparency and fair play. A

tender enquiry had been floated. The Fifth Respondent had admittedly not submitted a bid in response to the tender enquiry. The claim of the Fifth Respondent was on the basis of the alleged decision of the State Government of 5th October 1999 to allot the plot to the Fifth Respondent. This decision of the State Government, as noted earlier, had been rescinded by the Housing and Special Assistance Department on 22nd February 2000. Be that as it may, the Fifth Respondent failed to comply with the terms of the acceptance of its offer as communicated by the Board on 5th March 2005, consequent upon which the allotment to the Fifth Respondent was cancelled. The manner in which the Chief Executive Officer of the Board reviewed the cancellation of the allotment does not need any further comment since it is in clear transgression of every constitutional and legal principle based on fairness and equal treatment.

16. The Learned Advocate General has in the course of his submissions before the Court stated that the Second and Third Respondents do not intend to pursue the subject tender process any further and that fresh tenders would be invited at which all

prospective bidders including the Petitioners and the Fifth Respondent would be at liberty to bid. In the affidavit of the Mumbai Housing and Area Development Board dated 24th June 2005, it has been stated that on 6th June 2005, the Board has received an offer in the amount of Rs.30 crores from one Hariprasad M. Shah, acting on behalf of one Dinkar Builders and Realtors Pvt.Ltd. together with a cheque dated 4th June 2005 drawn on Standard Chartered Bank in the aforesaid amount. The Learned Advocate General stated that the Second and Third Respondents do not intend to accept the aforesaid offer, that being an unsolicited offer, and the course of action that would be followed would be to invite fresh bids. The Advocate General has stated that the Board has reason to believe that the price which is liable to be realised is much higher than the bids in the previous tender enquiry and the highest bid therein does not reflect a correct assessment of the value of the plot. The Court has been informed that both the Petitioners and the Fifth Respondent have withdrawn their bid amounts.

17. In so far as Writ Petition No.2112 of 2005 is concerned, the petition seeks to challenge and impugn the communications of

the Board dated 5th March 2005 and 30th April 2005 to the Fifth Respondent. In view of the statement which has been made on behalf of the Second and Third Respondents by the Advocate General to the effect that fresh bids would be invited, no further directions are sought in Writ Petition 2112 of 2005 which is accordingly disposed of.

18. During the course of these proceedings, we indicated to Counsel that this Court was inclined to recall the order dated 23rd December 2004 passed in Writ Petition No.3466 of 2004 since the order came to be passed upon the statement of the Government Pleader that the Second and Third Respondents had received an offer in the amount of Rs.22,22,22,300/-. As we have already noted in our order dated 14th July 2005, the Learned Government Pleader stated before the Court that he was not aware when he made the aforesaid statement that the bids furnished by the Petitioners had been provisionally accepted by MHADA and that due to this, he could not inform the Court about the correct factual position. Since the order was passed on the basis of an erroneous statement made across the Bar by the Government Pleader, we are of the view that it would be appropriate and proper for this

Court to recall the order dated 23rd December 2004 in Writ Petition No.3466 of 2004. We order accordingly. However, Writ Petition No.3466 of 2004 should, in our view, be restored to file in the interests of justice in order to enable the Fifth Respondent to have an opportunity to put forth the submission on merits in its Petition. Learned Counsel for the Fifth Respondent has urged that the Fifth Respondent seeks to asset an antecedent right to the plot on the basis of the earlier decision of the Government. We restore the said petition to file, in order to enable the Fifth Respondent to have an opportunity to assert its claim. There shall be accordingly an order in the aforesaid terms. The petition shall be placed for admission before the appropriate Bench.

19. We would also record that in the affidavit filed on behalf of the Third Respondent on 24th June 2005, it has been stated that the allotment made to the Petitioners has been cancelled on 7th May 2005. We clarify that we have not expressed any opinion either way in respect of this aspect of the matter, since no reliefs have been sought in that regard in these proceedings before the Court.

20. For the reasons as aforesaid, Writ Petition No.2112 of 2005 shall stand disposed of. The order dated 23rd December 2004 in Writ Petition No.3466 of 2004 is recalled. Writ Petition No.3466 of 2004 is restored to the file and should be placed for admission by the registry in accordance with the assignment of work before the appropriate Bench.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.